

Office of Chief Counsel
Internal Revenue Service

Memorandum

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EKHuss

APR -7 2000

- Chief, Appeals Division, Southwest District
Attn: William Keebler
- District Counsel, Southwest District, Phoenix

Collection Opinion

DISCLOSURE STATEMENT

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ISSUES

1. Whether a surviving spouse's receipt of a notice of intent to file a lien and to levy under I.R.C. §§ 6320 and 6330 and her assertion of collection due process rights tolls the collection statute of limitations with respect to her deceased husband.
2. Whether the wife's collection statute of limitations is suspended for her joint and several tax liability as to the parties' community real property located in [REDACTED] County, Arizona, when only the husband filed bankruptcy under Chapter 13.

CONCLUSION

1. The surviving spouse should not have been issued a notice of intent to file a lien and to levy under I.R.C. §§ 6320 and 6330 for her deceased husband's tax liabilities, nor does an assertion of rights by the surviving spouse suspend the statute of limitations as to the deceased taxpayer.

2. The wife's collection statute of limitation as to her joint and several tax liability is suspended as to the parties' community real property located in [REDACTED] County, Arizona, when only the husband filed for bankruptcy protection under Chapter 13.

FACTS

There are separate assessments against [REDACTED], now deceased, for [REDACTED], [REDACTED], and [REDACTED]. [REDACTED] married [REDACTED] on [REDACTED]. As a result of a bankruptcy filed, the statutes of limitations for collection activities for [REDACTED] and [REDACTED] have not yet run.¹ At the time of his death on [REDACTED], [REDACTED] was still married to [REDACTED], his Chapter 13 bankruptcy plan was not completed, and the [REDACTED] owned real property in [REDACTED] County, Arizona. This property was held as "community property with right of survivorship."

There are joint assessments against [REDACTED] for [REDACTED] and [REDACTED]. The original assessments for [REDACTED] and [REDACTED] were separate assessments against [REDACTED]. However, on [REDACTED] and [REDACTED], joint amended returns were filed for the [REDACTED] and [REDACTED] years, respectively, that

¹ The [REDACTED] and [REDACTED] taxes were assessed against [REDACTED] on [REDACTED] and [REDACTED], respectively. [REDACTED] file a Chapter 13 bankruptcy on [REDACTED]. [REDACTED] died in [REDACTED] and the bankruptcy was dismissed on [REDACTED]. The bankruptcy plan was not completed and the debts owed the federal government survived the bankruptcy. Pursuant to I.R.C. § 6503(h), the collection statute of limitations was suspended during the period of the bankruptcy, plus six months. Therefore the collection statutes of limitations for [REDACTED] and [REDACTED] have been recalculated to expire on [REDACTED] and [REDACTED], respectively. The statute of limitations for collecting the [REDACTED] taxes expired on [REDACTED], as the [REDACTED] taxes were assessed on [REDACTED].

resulted in the tax previously assessed being reduced. The collection statute of limitations as to [REDACTED] is still open because of the bankruptcy.²

In [REDACTED], the Service sent notices of intent to file a lien and to levy to [REDACTED] and her deceased husband for [REDACTED]'s joint tax assessments for the years [REDACTED] and [REDACTED]. Furthermore, the Service sent a notice of intent to levy to [REDACTED] and her deceased husband for the deceased husband's tax assessments for [REDACTED], [REDACTED], and [REDACTED]. [REDACTED] requested a hearing pursuant to I.R.C. §§ 6320 and 6330 for the taxable years [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. The case is currently under consideration by Appeals Officer William Keebler.

The issue regarding the suspension of the husband's collection statute of limitations came to District Counsel on an informal request for an oral opinion from Appeals. However, due to the novelty of the issues, Counsel thought it best to follow-up the oral advice given with this memorandum. Counsel has coordinated the oral advice regarding the notice and statute of limitations issues telephonically with John Chinnapongse for collection due process coordination in the Western Region, and with Robin Ferguson and Jerome Sekula of the General Litigation Division of the National Office.

DISCUSSION

1. HUSBAND'S COLLECTION STATUTE OF LIMITATIONS IS NOT TOLLED WHEN WIFE ATTEMPTS TO ASSERT DUE PROCESS RIGHTS

The Internal Revenue Service Restructuring and Reform Act of 1998 increased collection due process rights for taxpayers pursuant to I.R.C. §§ 6320 and 6330, which provide for notice and an opportunity for hearing before a notice of lien or a levy can be issued. I.R.C. § 6330(e), which applies to both liens and levies, states that if a hearing is requested, the running of any period of limitations under I.R.C. § 6502 shall be suspended while Appeals is considering the case and any hearings are pending. In this case, [REDACTED]'s period of limitations under I.R.C. § 6502 for her [REDACTED] and [REDACTED] assessments are suspended for the period during which the hearing and Appeals considerations are being conducted. However, [REDACTED]'s request for a due

² See supra note 1. The [REDACTED] and [REDACTED] taxes were assessed on [REDACTED] and [REDACTED], respectively. The recalculated collections statutes of limitations for [REDACTED] and [REDACTED] are [REDACTED] and [REDACTED], respectively.

process hearing for the assessments against her husband does not suspend the collection period under I.R.C. § 6502 as to [REDACTED]'s assessments.

[REDACTED]'s request for a collection due process hearing based upon her husband's assessments was not made on behalf of her husband, or his estate. In fact, the collection due process matters which [REDACTED] requested consideration in Appeals pertained to innocent spouse defenses.³ Had [REDACTED] been acting on behalf of her husband or his estate, then his statute of limitations could be affected by [REDACTED]'s request for a hearing.

I.R.C. § 6321 creates an automatic lien in favor of the United States after certain conditions are met. I.R.C. § 6331 gives the Service authority to levy taxes owed. Both I.R.C. §§ 6321 and 6331 use the same language to describe the person who is subject to the lien or levy as, "any person liable to pay any tax." I.R.C. § 6320 refers to I.R.C. § 6321 to define who should receive the notice of the filing of a notice of lien. Furthermore, although I.R.C. § 6330 does not refer to § 6331 to define who is to receive notice of the intended levy, I.R.C. § 6331 defines who the United States is able to make a levy upon. Therefore, the Service has determined that the person described in I.R.C. § 6330(a)(1) is the same person described in I.R.C. § 6331(a). T.D. 8809, 1999-7 I.R.B. 27. As the taxpayer who was subject to the assessment is the only person liable to pay any tax, the provisions of I.R.C. §§ 6320 and 6330 are not available to third parties. See T.D. 8809, 1999-7 I.R.B. 27.

Although Arizona is a community property state and the property subject to collection in this case is community real property, [REDACTED] is a third party to the assessments against her deceased husband and the collection due process procedures under I.R.C. §§ 6320 and 6330 are not available to her. Although [REDACTED] would not be entitled to a collection due process hearing or an equivalent hearing, she may request reconsideration by the Revenue Officer, assistance from the Taxpayer Advocate, or a hearing before Appeals under the Collection Appeals Program. See T.D. 8809, 1999-7 I.R.B. 27 (Feb. 16, 1999) (explaining remedies available to known nominees of a person holding property subject to a lien which is about to be levied). Lastly, should [REDACTED] dispute the Service's ability to lien or levy the [REDACTED] County property based upon her husband's liabilities, she

³ I.R.C. § 6330(c)(2)(i) provides that a person may raise appropriate spousal defenses at the collection due process hearing.

has judicial remedies as well. She could bring an action to quiet title or an action for wrongful levy under I.R.C. § 7426(a)(1).

2. SUSPENSION OF WIFE'S COLLECTION STATUTE OF LIMITATIONS DURING HUSBAND'S BANKRUPTCY

Bankruptcy Code § 541(a)(2) states that the bankruptcy estate is comprised of all interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is either under the sole, equal, or joint management and control of the debtor; or is liable for an allowable claim against the debtor. In this case, the community property located in ██████ County was under joint management and was liable for ██████'s tax assessments for the tax years ██████, ██████, ██████, ██████, and ██████. A.R.S. § 25-214(B); See A.R.S. § 25-215(C), (D); Samaritan Health System v. Caldwell, 191 Ariz. 479, 957 P.2d 1373 (1998). Therefore, the ██████ County property would have been included in the bankruptcy estate.

Section 362(a) of the Bankruptcy Code prohibits a prepetition creditor from obtaining possession of property in the bankruptcy estate. Therefore, the United States would not have been able to obtain the ██████ County real property based upon the debtor's prepetition ██████, ██████, ██████, ██████, and ██████ tax liabilities, all of which were assessed prior to ██████'s bankruptcy. Furthermore, as the ██████ County real property was held as community property and was subject to the automatic stay prohibiting collection, the United States was not able to seek possession of the property based upon ██████'s ██████ and ██████ tax assessments. In re Reiter, 126 B.R. 961 (Bankr. W.D. Tex. 1991).

I.R.C. § 6503(h) states that the running of the collection statute of limitations under I.R.C. § 6502 shall be suspended for the period during which the Secretary is prohibited by reason of a bankruptcy from collecting on a tax owing, and for six months thereafter. Therefore, as the United States was prohibited from satisfying ██████'s ██████ and ██████ assessments with the real property located in ██████ County due to the automatic stay created by her husband's bankruptcy, the statute of limitations for collecting tax for ██████ and ██████ was suspended as to the ██████ County real property during the period that the bankruptcy's automatic stay was in effect, and six months thereafter. Importantly, this opinion only discusses the suspension of ██████'s collection statute of limitations for ██████ and ██████ as to the ██████ County real property. Should the Service wish to pursue collection against ██████ for the ██████ and ██████ tax years based upon property other than the ██████ County real property, another legal analysis will be required.

Should you have any further questions or need additional assistance, please contact me at (602) 207-8051.

DAVID W. OTTO
District Counsel

By: 

ERIN K. HUSS
Attorney

cc: Office of Assistant Chief Counsel, Branch 1
John Chinnapongse